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Court of Appeals No. 01-18-00930-CR
Trial Court Cause No. B15-684

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IN THE FIRST SUPREME JUDICIAL DISTRICT

COURT OF APPEALS

HOUSTON, TEXAS

KYLE DEAN KUYKENDALL

v.

THE STATE OF TEXAS

APPEALED FROM THE 198TH JUDICIAL DISTRICT COURT,
KERR COUNTY, TEXAS
Honorable M. Rex Emerson, Presiding

APPELLANT'S BRIEF

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Trial Court Cause Nos. B15-684

IN THE FIRST SUPREME JUDICIAL DISTRICT

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KYLE DEAN KUYKENDALL

v.

THE STATE OF TEXAS

IDENTITY OF PARTIES & COUNSEL

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this appeal:

Appellant:	Kyle Dean Kuykendall
Appellee:	The State of Texas
Attorney for Appellant:	M. Patrick Maguire M. Patrick Maguire, P.C. 945 Barnett Street Kerrville, Texas 78028
Attorney for Appellee:	Hon. Scott Monroe 198th Judicial District Attorney 402 Clearwater Paseo, Suite 500 Kerrville, Texas 78028

Trial Judge:	Hon. M. Rex Emerson 198th Judicial District Judge 700 Main Street Kerrville, Texas 78028

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STATUTES AND RULES

STATEMENT OF THE CASE

On May 30, 2018, Appellant entered a guilty plea to two counts of bail jumping/failure to appear, both third degree felony offenses. RR 2, 11-12. The trial court ordered a presentence investigation and reset the case for sentencing. RR 2, 12. The trial court held the sentencing hearing on August 1, 2018. RR 3, 1. After hearing the evidence, the trial court sentenced Appellant to 10 years imprisonment on each count, to run concurrently. RR 3, 23. Appellant timely filed his notice of appeal from this judgment. CR, 32. This brief is timely filed by being electronically filed with the First Court of Appeals on June 10, 2019.

APPELLANT'S ISSUES PRESENTED FOR REVIEW

I. Appellant's convictions violate the double jeopardy clause because Appellant was convicted of failure to appear on two cases that were set for the same day in the same court that were the subject of the same two-count indictment.

II. The evidence is insufficient to support the trial court's judgment against Appellant for court-appointed attorney's fees because the presumption of Appellant's indigence was never rebutted.

****** For purposes of reference in the Appellant's Brief the following will be the style used in referring to the record:

1. Reference to any portion of the Court Reporter's Statement of Facts will be denoted as "(RR____, ____)," representing volume and page number, respectively.

2. The Transcript containing the District Clerk's recorded documents will be denoted as "(CR___, ___)."

SUMMARY OF THE ARGUMENTS

I. Appellant's convictions violate the double jeopardy clause because Appellant was convicted of failure to appear on two cases that were set for the same day in the same court that were the subject of the same two-count indictment.

II. Article 26.05(g) of the Texas Code of Criminal Procedure allows the trial court to order a defendant reimburse the costs of court-appointed legal counsel that the court finds the defendant is able to pay. However, a defendant who is determined by the trial court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. Appellant was originally found to be indigent and the trial court appointed counsel to represent Appellant. The trial court's judgment ordered Appellant to pay $225.00 in court-appointed attorney's fees. This order is improper because Appellant was presumed to be indigent and that presumption remained throughout Appellant's case. Therefore, the judgment should be modified to remove the order to pay court-appointed attorney's fees.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that this brief contains 3,315 words (counting all parts of the document and relying upon the word count feature in the software used to draft this brief). The body text is in 14 point font and the footnote text is in 12 point font.

/s/ M. Patrick Maguire
M. Patrick Maguire,
Attorney for Appellant

STATEMENT OF FACTS

On May 30, 2018, Appellant entered a guilty plea to two counts of bail jumping/failure to appear, both third degree felony offenses. RR 2, 11-12. The trial court ordered a presentence investigation and reset the case for sentencing. RR 2, 12. The trial court held the sentencing hearing on August 1, 2018. RR 3, 1. After hearing the evidence, the trial court sentenced Appellant to 10 years imprisonment on each count, to run concurrently. RR 3, 23.

The failure to appear charges are each the subject of a single two-count indictment that was pending in the same trial court. CR, 6. The hearing on the underlying cases was set for the same date and time. CR, 6.

ARGUMENTS & AUTHORITIES

I.
Appellant's convictions violate the double jeopardy clause because Appellant was convicted of failure to appear on two cases that were set for the same day in the same court that were the subject of the same two-count indictment.

A. Standard of Review

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects an accused against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Ex parte Marascio*, 471 S.W.3d 832, 847 (Tex. Crim. App. 2015). The correct double jeopardy analysis in a case such as this is a "units inquiry." *Id*. The "analysis of an allowable unit of prosecution involves a situation in which two offenses from the same statutory section are charged." *Id*.

If a court determines that there is a double-jeopardy violation, the proper remedy is to vacate one of the convictions; no additional proceedings are required. *Id*. at 845.

B. Analysis

The threshold question that must be addressed is whether this claim may be raised on a direct appeal where the claim was not raised in the trial court.

Appellant entered guilty pleas to each count of the underlying indictment. CR, 21; CR, 24. Appellant did not file any pleadings asserting a violation of his double jeopardy rights. Nor did he raise the issue before the trial court at any pre-trial hearing. At first blush, it may appear that Appellant's double jeopardy claim is not cognizable on appeal. However, there is an exception to the rule of procedural default in the case of a double jeopardy claim. Because of the fundamental nature of double jeopardy protections, a double jeopardy claim may be raised for the first time on appeal or even for the first time on collateral attack when the undisputed facts show that the double jeopardy violation is clearly apparent on the face of the record and when enforcement of usual rules of procedural default serves no legitimate state interests. *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). *Gonzalez* recognized that a double jeopardy claim may be cognizable for the first time on appeal because it is a "fundamental" right." *Id.*

Double Jeopardy Claim is Apparent from Face of Record

A double-jeopardy claim is apparent on the face of the trial record if resolution of the claim does not require further proceedings for the purpose of introducing additional evidence in support of the double-jeopardy claim. *Ex parte Marascio,* 471 S.W.3d 832, 845 (Tex. Crim. App. 2015) (J. Richardson concurring).

The presentence investigation report that was admitted into evidence at Appellant's sentencing states "Motions to Proceed for the Debit/Credit card cases were filed on May 21, 2015 and arrested on two warrants on August 15, 2015. The Motions to Proceed were amended on November 10, 2015 and again on February 1, 2016…. Defendant failed to appear for Court on November 30, 2015, after being released on bond for the above mentioned Motions to Proceed." RR 4, 9 (emphasis added). The Bailiff's Certificate from the underlying case, which is made part of the presentence investigation report, also reflects that Appellant failed to appear in the underlying felony cases on November 30, 2015. RR 4, 70.

The indictment in this case also shows that the double jeopardy violation is clearly apparent from the face of the record. CR, 6. The indictment alleges that Appellant failed to appear in the trial court on November 30, 2015 for the two underlying offenses. CR, 6; RR 4, 68-69.

The double-jeopardy claim in this case is apparent from the face of the record.

No Legitimate State Interest Served by Enforcing Rules of Procedural Default

As to the second prong of the *Gonzalez* test, while the state may assert an interest in maintaining the finality of a conviction, there is no legitimate interest in maintaining a conviction if it is clear on the face of the record that the conviction was obtained in contravention of constitutional double jeopardy protections. *Ex parte Marascio*, 471 S.W.3d 832, 844 (Tex. Crim. App. 2015) (J. Richardson concurring). Instead, the focus should be on whether Appellant has met the first prong of the *Gonzalez* test—*is a double jeopardy violation apparent on the face of the record*. *Id*. at 845.

In this case, there would be no legitimate state interest served by enforcing the procedural rules of default. Appellant was sentenced to the same sentence of 10 years in each offense to run concurrently. CR, 21; CR, 24. Should this Court determine that a double jeopardy violation occurred, the appropriate remedy is to vacate one of the convictions. *Id*. at 845. No additional proceedings are required. *Id*.

Double Jeopardy Violation

The Court of Criminal Appeals addressed this issue in *Ex parte Marascio*, 471 S.W.3d 832 (Tex. Crim. App. 2015). *Marascio* is a

conglomeration of concurring and dissenting opinions which culminate in a plurality opinion that gives no binding precedent. Thus, the question remains unresolved.

In *Marascio*, the defendant was convicted of three charges of felony bail jumping/failure to appear, and he was sentenced to eight years' imprisonment on each charge, to run concurrently. *Id*. at 832. *Marascio* was a post-conviction habeas corpus proceeding wherein the defendant raised a double-jeopardy claim for the first time. *Id*. at 840.

Marascio was charged under three separate indictments for the felony offenses of False Statement to Obtain Property or Credit, Money Laundering, and Engaging in Organized Criminal Activity. *Id*. at 840-41. All three cases were set for pretrial hearing. *Id*. at 841. The terms of Marascio's release under each of the three bond orders required that he be present at all court settings. *Id*. Marascio failed to appear for one of his court settings on March 25, 2009. *Id*. Marascio was subsequently found guilty of three separate charges of Bail Jumping and Failure to Appear based upon his failure to appear for the March 25, 2009 pretrial hearing. *Id*. at 841.

One of the questions that was supposed to be determined in the *Marascio* habeas proceedings was "[w]hether convictions for multiple

charges of failure to appear arising from a single failure to appear constitute a double jeopardy violation." *Id*. at 841, n.8. This question, however, remains undecided.

Appellant urges this Court to adopt Judge Johnson's reasoning in her *Marascio* dissent. Judge Johnson takes a common sense approach to the analysis of a double-jeopardy violation. She recognizes the fact that when dealing with a double-jeopardy violation, the court is dealing with a fundamental constitutional right. *Id*. at 852-53. In determining whether a double-jeopardy violation has occurred, the gravamen of the offense is that the defendant failed to appear. *Id*. at 853-54. The sole gravamen of the offense remains the act of failing to appear, thus the "unit of prosecution" for double jeopardy purposes is the number of times the person failed to appear. *Id*. at 854 (J. Johnson dissenting).

Judge Johnson dismissed the assertion that the gravamen of the offense is the "violation of the terms of release" of each individual bail bond. *Id*. The terms of the defendant's release are a contract between the defendant and the bail bondsman. *Id*. This contract has no bearing on the gravamen of the offense or the role of the trial court. The only way in which the dignity of the trial court was harmed was that he failed to appear in court. *Id*.

Judge Johnson noted that "[w]e do not charge a thief with four thefts if he steals a wallet that contains cash and three credit cards; we charge him with a single theft. And if a burglar enters a home without consent once and commits theft, assault, and arson, he may be charged with only one burglary, not three. Likewise we should not condone three charges for a single act of failing to appear." *Id*. at 855 (J. Johnson dissenting).

Judge Alcala's dissent in Marascio is also instructive in support of Appellant's position. Judge Alcala noted that "[i]n determining whether a particular course of conduct involves one or more distinct offenses under a single statute, we must ascertain the 'allowable unit of prosecution' under the statute." *Id*. at 859. The bail jumping/failure to appear statute does not expressly define the allowable unit of prosecution for the offense. *Id*. The statutory language, however, focuses on a defendant's failure to appear in accordance with the "terms of his release." *Id*. Judge Alcala noted that "[i]t is axiomatic that [a defendant] is a single person and could be released from his confinement only one time, regardless of the number of cases for which he was being held." *Id*. at 859-60. Because the statutory language refers to the "terms of his release," this suggests that the gravamen of the offense of bail jumping/failure to appear treats his release as a single thing regardless

of whether he is being released on bail on one or many cases. *Id*. at 860 (J. Alcala dissenting).

Judge Alcala pointed out that in situations involving a similar gravamen, the Court of Criminal Appeals has held that only one conviction is permitted. *Id*. (citing *Harris v. State*, 359 S.W.3d 625, 630-32 (Tex. Crim. App. 2011) (holding that multiple convictions for indecency with a child by exposure violated double jeopardy because the gravamen of the offense was the exposure and not the number of children present)). Similarly, the gravamen of the offense of bail jumping/failure to appear is the act of failing to appear in court as required by the terms of a defendant's release from confinement on the multiple cases, and not the number of cases for which the defendant failed to appear. *Id*.

Because the gravamen of the offense of bail jumping/failure to appear is the failure to appear in court, Appellant's multiple convictions for failure to appear arising from a single missed court appearance constitute a double jeopardy violation. Accordingly, Appellant requests that this honorable Court vacate one of the convictions to remedy the double jeopardy violation.

II.
The evidence is insufficient to support the trial court's judgment against Appellant for court-appointed attorney's fees because the presumption of Appellant's indigence was never rebutted.

A. Standard of Review

Code of Criminal Procedure Article 26.05(g) allows the trial court to order a defendant to re-pay costs of court-appointed legal counsel that the court finds the defendant is able to pay. *Cates v. State*, 402 S.W.3d 250, 251 (Tex. Crim. App. 2013). Under Article 26.05(g), "the defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees." *Id*. However, a defendant who is determined by the trial court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. *Tex. Code Crim. Proc. art. 26.04(p)*.

Article 26.05 of the code of criminal procedure governs the assessment of court-appointed attorneys' fees. *Gordon v. State*, 2010 Tex. App. LEXIS 6355, 4 (Tex. App.—Austin 2010, no pet.) (unpublished op.). According to the court of criminal appeals in *Mayer v. State*, a trial court order to reimburse court-appointed attorneys' fees can be challenged for sufficiency of the evidence to support it and, therefore, such challenge can be raised for the first time on appeal. 309 S.W.3d 552, 554-56 (Tex. Crim.

App. 2010). The *Mayer* court also held that if the evidence is found to be insufficient, the preferred remedy is not remand to the trial court, but reformation of the judgment to delete the order for payment of attorneys' fees. *Id*.

B. Analysis

Appellant was initially found to be indigent on April 18, 2018 and the trial court appointed counsel to represent him. CR, 8. Appellant's sentencing hearing was held on August 1, 2018. RR 3, 1. At no time in the interim was there any finding made that Appellant's financial status changed. The trial court's judgment reflects that Appellant is liable for $225.00 in court-appointed attorney's fees. CR, 21. On August 28, 2018, the trial court made a second finding that Appellant was indigent and wished to prosecute this appeal. CR, 29.

In the absence of a present finding that Appellant had the financial resources to pay court-appointed attorneys' fees, the trial court's order violates Article 26.05 of the code of criminal procedure. *Cates v. State*, 402 S.W.3d 250, 251 (Tex. Crim. App. 2013). A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occur. *Id*. The only findings in the record were that

Appellant was indigent and unable to pay attorneys' fees. Therefore, the evidence is insufficient to support the trial court's order assessing attorneys' fees against Appellant. Appellant prays that this honorable Court reform the trial court's judgment and delete the order for court-appointed attorney's fees.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Honorable Court sustain the appellate contentions herein and vacate one of the convictions for failure to appear. Appellant further prays that this Honorable Court reform the trial court's judgment to delete the award of court-appointed attorney's fees.

Respectfully submitted,

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ATTORNEY FOR APPELLANT,
KYLE DEAN KUYKENDALL

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Appellant's Brief to counsel for the State, Hon. Scott Monroe, via electronic transmission at *scottm@198da.com*, and whose address is 402 Clearwater Paseo, Suite 500, Kerrville, Texas 78028 on this the 10th day of June, 2019.

/s/ M. Patrick Maguire
M. Patrick Maguire